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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1065

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

vs.

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE
AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida and District Court of Appeal of Florida, First District

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NO. _____

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

vs.

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida and District Court of Appeal of Florida, First District

---

Petitioner prays a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, entered in the above-entitled cause on June 13, 1972. (App. C) Petition for Rehearing was denied by that court by Order entered July 10, 1972. (App. D)

Petition for Writ of Certiorari was directed to the Supreme Court of the State of Florida on August 8, 1972, and that court by Order filed November 7, 1972, denied the Petition for Writ of Certiorari. (App. A)

OPINIONS BELOW

The Opinion of the District Court of Appeal of Florida, First District, to which this Petition is directed, is reported in 263 So.2d 632. This Opinion *in toto* appears as Appendix A to this Petition for Writ of Certiorari.

Order denying a Petition for Rehearing addressed to this Opinion was filed July 10, 1972. This Petition appears as Appendix B to this Petition. (App. 3)

This Petition was denied by the Supreme Court of Florida by Order entered November 7, 1972. This Order appears as Appendix A to this Petition. (App. 1)

JURISDICTION

The Order of the Supreme Court of Florida denying the Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, was filed November 7, 1972. (App. A)

The jurisdiction of this court is invoked under and pursuant to the provisions of 28 U.S.C., Sec. 1257(3) and Rule 19(1)(a), Supreme Court Rules.

The Writ of Certiorari is to be directed to the District Court of Appeal of Florida, First District, whose opinion is actually the one sought to be quashed. The Supreme Court of Florida, who earlier had issued an Opinion (231 So.2d 823) quashing a prior Opinion of the District Court (214 So.2d 89) affirming a verdict for this Petitioner, refused to review the instant opinion of the District Court (App. A) by Order filed November 7, 1972.

QUESTIONS PRESENTED

ONE

DOES THE OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, REVERSING THE JUDGMENT OF THE CIRCUIT COURT AND REMANDING THE CAUSE WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THESE RESPONDENTS DECIDE A SUBSTANTIAL FEDERAL QUESTION IN A MANNER NOT IN ACCORD WITH PRIOR DECISIONS OF THIS COURT?

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STATUTES AND RULES INVOLVED

Rule 19, Supreme Court Rules, particularly Section 1(a), reads as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > "(a) *Where a state court has decided a federal question of substance* not theretofore determined by this court or has decided it *in a way probably not in accord with applicable* decisions of this court." (Emphasis Supplied)

28 USCA, Sec. 1257(3), provides:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, to the Constitution of the United States reads as follows:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Seventh Amendment to the Constitution of the United States reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner was the original Plaintiff in a libel and slander action filed in the Circuit Court of Franklin County, Florida.

A Judgment was entered after the first trial based upon a jury verdict awarding Petitioner $10,000 compensatory damages and $5,000 punitive damages. (App. C, App. 13, 14)

The District Court of Appeal of Florida, First District considered that Judgment on appeal by these Respondents and affirmed the Judgment awarding both compensatory and punitive damages. (*Gibson v. Maloney*, Fla. App. 1968, 214 So.2d 89)

The Supreme Court of Florida then granted certiorari and quashed the Opinion of the District Court of Appeal remanding the cause to that court with instructions to further remand the cause to the trial court for a new trial upon proper instructions on the law. (*Gibson v. Maloney*, Fla. 1970, 231 So.2d 823)

A second trial was held in the Circuit Court of Franklin County in January, 1971. This resulted in a mistrial when the jury was unable to agree on a verdict.

In May, 1971, a third trial was held which resulted in a verdict and judgment against both Respondents for $5,000 compensatory damages and $20,000 punitive damages against the corporate Respondent. (App. C, App. 13)

That verdict and judgment of the Circuit Court was then again appealed to the District Court of Appeal of Florida, First District, by these Respondents and that court on June 13, 1972, entered its Opinion reversing the trial court and remanding the cause to the trial court with *"directions to enter judgment in favor of the Appellants."* (*Gibson v. Maloney*, Fla.App. 1972, 263 So.2d 632) (App. C, App. 13-24)

Petitioner then sought certiorari from the Supreme Court of Florida to review the Opinion of the District Court of Appeal and certiorari was denied by Order of the Supreme Court filed November 7, 1972. (App. A, App. 1, 2)

The only judicial labor left to be performed under the decision, review of which is sought here, is the ministerial act of the trial court's entering a judgment for these Respondents, the original Defendants below, in accordance with the mandate and directions of the District Court of Appeal.

This renders the matter a "Final Judgment" within the meaning of that term as used by this court in considerations of matters which are subject to review by certiorari. (*Catlin v. United States*, 324 U.S. 229, 233; *Gillespie v. U. S. Steel Corp.*, 1964, 379 U.S. 148; 9 Moore's Federal Practice, Section 110.08, Pgs. 111-118)

The basis for the decision, review of which is now sought, was the District Court of Appeal of Florida's interpretation and application of the opinions of this court construing state laws of libel and slander in light of the

restrictions placed upon such laws by the constitutional guarantees contained in the First, Seventh and Fourteenth Amendments to the United States Constitution in cases involving "public officials" or "public figures".

Particularly, the District Court in its Opinion considered and applied its interpretation of the Opinions in the cases of

ROSENBLOOM V. METROMEDIA
403 U.S. 29, 91 S.Ct. 1811,
29 L.Ed 2d 296,

ST. AMATH V. THOMPSON
390 U.S. 727, 20 L. Ed 2d 262

GARRISON V. LOUISIANA
379 U.S. 664, and

NEW YORK TIMES V. SULLIVAN
376 U.S. 254

These federal decisions were the basis for the District Court's holding in this cause.

The District Court of Appeal prospectively explained its apparent contradictory position in reversing the verdict and judgment for this Petitioner coming out of the third trial of this matter after having previously affirmed the verdict and judgment on the original trial by relying upon the Opinion of this court in *Rosenbloom v. Metromedia*, supra, and explaining:

• • • "We hasten to add that the entire field of libel actions has recently undergone a significant change as to governing principles. Some of these changes have taken place subsequent to the trial in the case at bar. Accordingly, although we must apply new principles which have evolved during this appeal, we think it only fair to observe that in large measure the judgment now under review must be reversed by reasons of changes in the law of libel occurring after the entry of the final judgment and, of course, of which the trial court was unaware." (App. C, App. 19)

The District Court concluded *as a matter of law*, contrary to the prior determinations of two juries before whom the case had been tried, the libel complained of in this instance did not constitute *"actionable libel"* under the decisions of this court in *St. Amant v. Thompson*, supra, *New York Times v. Sullivan*, supra, and *Rosenbloom v. Metromedia*, supra.

The dissenting opinion by one of the three judges of the District Court of Appeal concurred in the matter of the reversal of the particular jury verdict and judgment based thereon by reason of improper charges as to the law applicable in the instance of public figures but *dissented from that portion of the Opinion which directed the trial court to enter a judgment in favor of these Appellants.* (App. C, App. 23, 24)

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION FIRST RAISED

The federal question pertaining to the right of comment in the instance of allegedly "public figures" was first raised in this cause in the Answer to Amended Complaint for Libel and Slander filed in the trial court:

SIXTH DEFENSE

> " * * * The Words complained of were made without malice on the activities of the Plaintiff as a public person or official and are conditionally privileged and constitute fair comment."

The issue remained present throughout the original trial, the first appeals in this cause, and the second trial and appeals. The determinative factor in the decision now before this court was the interpretation and evaluation of what constitutes "actionable libel" and proof thereof with "convincing clarity" as set forth in the Opinions of this court interpreting the provisions of state statutes governing libel and slander in light of the guarantees of free speech and free press under the United States Constitution and Amendments thereto.

The decisive factor in the litigation was the interpretation and application of the cited decisions of this court interpreting federal constitutional rights and privileges as applied to Florida Statutes governing libel and slander. The gist of Petitioner's complaint here is the *District Court misinterpreted and misapplied decisions of this court interpreting federal constitutional provisions.*

The substantial federal question has been the issue in this cause since the original pleadings and was the determinative factor in the eventual result reached by each court which has considered the matter.

REASONS FOR GRANTING THE WRIT

The District Court of Appeal of Florida in relying upon and applying the opinions of this court in *Rosenbloom v. Metromedia, supra, St. Amant v. Thompson, supra, and New York Times v. Sullivan, supra,* misinterpreted and misapplied the law as pronounced by this court in those decisions and reached a conclusion contrary to that reached by this court in legally similar situations concerning the applicable provisions of the constitutional right of free speech in relation to comment upon public figures or officials.

Secondly, the District Court of Appeal improperly extended the right of comment on the actions of a "public figure" (assuming arguendo the publisher of a small weekly newspaper can be a "public figure" under the facts and circumstances shown in this Petition and Appendix) to include remarks made by a private individual to a selected group (a Rotary Club) not for dissemination to the general public and which were in support of the business interests of the person making the statement or his corporate employer.

Particularly would this be true when the private individual making the statements alleged to be libelous against this Petitioner made such statements to this private select group and the statements were, as pointed out in the opinion by the District Court of Appeal, "*erroneous, inaccurate, and negligently made.*" (App. C, App. 22)

The individual Respondent, Defendant below, who made the actual statements complained of and subsequently had them printed and mailed out to a select, captive audi-

ence of telephone subscribers of the corporate Defendant, of which he was the President, made statements which were admittedly erroneous, and they were made by this individual *who would by reason of his position as President of the telephone company have access to the actual facts and would be a person upon whose opinion the general public would necessarily rely as to truth and accuracy because of the position occupied by the Defendant and his access to the factual information which he erroneously reported.*

The District Court admitted the *erroneous, inaccurate and negligent nature of these factual statements* made by this individual Respondent acting on behalf of the corporate Respondent and, *when a trial jury twice concluded such inaccurate factual statements were made with actual malice by a person who knew them to be false or should by reason of his position have such knowledge,* the District Court concluded as a matter of law the jury's findings should be disregarded.

The District Court in its Opinion said:

> "Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made." (App. C, App. 22)

The statement made and circulated by this private individual acting on behalf of his corporate employer asserted a loss of telephone subscribers in a particular exchange and then attributed this loss in direct, positive and unequivocal terms to this Petitioner and his activities as publisher of a local newspaper.

Respondent GIBSON said and subsequently had printed and mailed out to a selected audience:

> "Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; * * *;" (App. C, App. 15)

The statement was at all times false and this Defendant had to know this for he was the president of the telephone company. He admitted he was aware of the opening of a new exchange and the transfer of subscribers to that exchange from the Apalachicola exchange. (App. C, App. 15 & 22)

At no time has any decision of this court, including the decisions relied upon by the District Court of Appeal, ever extended to or made immune from prosecution for damages a *private individual who makes admittedly erroneous and inaccurate factual statements* where he by reason of his position as president of the company involved would have first-hand knowledge of the accurate facts

and would be expected by the general public to speak the truth, when such statements are made not in the pressure of time of public broadcasting or news reporting but in a prepared speech delivered before a selected, private group and subsequently printed and mailed out to a captive audience of telephone company subscribers who had not requested such information but would be expected to believe in its accuracy because of its source.

Certainly, a jury question is presented *in every instance where the statements made are admittedly false* and the issue presented for jury determination would be whether there was *actual malice* in the making of such statements. The jury found this to be true.

The circumstances reflected in the opinion in this cause show the antagonistic position occupied by the individual Respondent and his corporate employer toward the Petitioner, who is the weekly newspaper publisher in the community. There can well be implied a converse antagonistic attitude by the publisher toward Respondents, but in no decision of this court has the defense of contributory negligence ever been held to be a complete defense to a proven claim of inaccurate statements made, as determined by this jury, with actual malice.

The District Court of Appeal misinterprets the decisions of this court and superimposes upon them a privilege they extend to a private individual covering remarks made to a select, private group whereas *all decisions of this court have been predicated upon the right of the general public to have before it for consideration items which might be considered of current interest if disseminated in the public interest.*

In no decision of this court has the privilege of free speech ever been extended so far as to allow a private individual to libel another private individual and then claim *"public figure"* or set up as a defense that the private individual has also been guilty of libel and inaccurate statements against the speaker or his corporate employer and therefore no cause of action exists between either party. This eliminates the fact each statement could have different consequences, to be determined by one or more juries.

The District Court of Appeal in its Opinion justified the misstatements and malicious conduct of these Respondents by indicating this Petitioner has "published inaccurate statements about the duPont interests and is likewise inescapable from this record." (App. C, App. 22) This may give the duPont interests a cause of action, but it does not give them a license to make false statements about Petitioner or constitute a total defense to false statements made by them.

A comparison of the Opinion and conclusion in the instant case with the law as pronounced by this court in previous decisions heretofore referred to *reaches the inescapable conclusion the court over-extended the doctrines which this court had pronounced and reached an erroneous conclusion in this instance.*

A lengthy discussion of the right of a free press under federal constitutional safeguards appears in Mr. Justice Brennan's opinion in *Rosenbloom v. Metromedia.* This discussion concludes with this restriction on application of the right of free press as guaranteed to news media by reason of their duty to disseminate matters of interest to the members of the general public:

> *"Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.'* Garrison v. Louisiana, 379 U.S. 64, 75, 13 L.Ed 125, 133, 85 S.Ct. 209 (1964)." (Op. 317) (Emphasis Supplied)

In the ROSENBLOOM case, this court was faced with interpretation of state libel laws (Pennsylvania) in light of federal constitutional guarantees of free speech and free press. In the instant case, we have the same situation with the issue being the application of state libel laws (Florida) in light of federal constitutional guarantees of free speech *as they may apply to a private individual addressing a select, private club.*

Relative to the significant difference in application of the free speech and free press privilege of the United States Constitution when applied to public media disseminating news to the general public as distinguished from a private individual or corporation disseminating private subscription credit reports or other information to select groups, the Circuit Court of Appeals of the Tenth Judicial Circuit in the case of

> KANSAS ELECTRIC SUPPLY COMPANY
> V. DUN & BRADSTREET, INC.
> (CCA 10, 1971) 448 F.2d 647
> (Cert. denied U. S. Supreme Court
> March, 1972, 92 S.Ct. 1289),

held the "public figure" privilege and the "New York Times doctrine" did not apply to private subscription credit reports or to private individuals or publications which did not disseminate news of general interest for

consideration by the public. See also *C. R. Grove, et al. v. Dun & Bradstreet, Inc.*, (CCA 10, 1971), 448 F.2d 647.

There is obviously a different application of free speech when a private individual is making a speech to a select, private group, which speech can from the circumstances surrounding the delivery of the address and content thereof be construed as furthering the aims of the corporate employer to discredit the publisher of the local weekly newspaper, than govern the circumstances present in the cases relied upon by the District Court to support its conclusions and results.

This must necessarily be inherent in the award by two juries of compensatory damages in a substantial amount against the individual and corporate Defendant and a $20,000 award of punitive damages against the corporate Defendant.

Petitioner has obviously been denied his rights under the First, Seventh and Fourteenth Amendments to the United States Constitution by the erroneous extension of the doctrines enunciated in decisions of this court by the District Court in attempting to support a conclusion contrary to that reached in decisions of this court.

Consideration by this court of the decision now before it for review will show a *prima facie* case for the issuance of the Writ of Certiorari in this cause. This Petitioner is without relief in any other forum for the only act remaining to be done is the ministerial act of the entry by the trial court of a Judgment in favor of these Respondents as directed by the District Court of Appeal of Florida.

NONE OF THE CASES RELIED UPON BY THE DISTRICT COURT INVOLVE FACTS WHERE A PRIVATE INDIVIDUAL IS CLAIMING RIGHT OF FREE COMMENT IN A SPEECH MADE TO A PRIVATE GROUP AND IN NONE OF THE CITED CASES WAS THERE AN INSTANCE OF AN ADMITTEDLY "*ERRONEOUS, INACCURATE, AND NEGLIGENTLY MADE*" FACTUAL ASSERTION BY A PERSON WHO BY REASON OF HIS POSITION WOULD BE CHARGED WITH KNOWLEDGE OF THE TRUTH OR FALSITY OF SUCH FACT.

Petitioner now seeks an Order of this court quashing the decision of the District Court of Appeal of Florida and reinstating the judgment based on the jury verdict returned in the Circuit Court of Franklin County, Florida, following the third trial of this cause.

CONCLUSION

Misinterpretation and misapplication of the libel laws of the State of Florida in light of the decisions of this court denies Petitioner his right to trial by jury and his right to seek relief for libel and slander, all contrary to the provisions of the First, Seventh and Fourteenth Amendments to the Constitution of the United States.

Such denial of right to trial by jury and denial of right of redress is purportedly predicated upon and supported by decisions of this court which are set forth in the cited opinion.

Petitioner seeks relief from this court in having the decision of the District Court of Appeal of Florida quashed and the verdict and judgment reinstated.

Respectfully submitted,

J. BEN WATKINS of
WATKINS & HILL
P. O. Drawer 1814
Tallahassee, Florida
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify copy of the foregoing Petition for Writ of Certiorari was furnished Isler, Welch, Bryant, Smith & Higby, 434 Magnolia Avenue, Panama City, Florida, attorneys for Respondents, this _____ day of _____, 1973.

_____

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1972

TUESDAY, NOVEMBER 7, 1972

CASE NO. 42,677

DISTRICT COURT OF APPEAL
FIRST DISTRICT

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,

Petitioner,

vs.

B. ROY GIBSON, JR. and
ST. JOSEPH TELEPHONE AND
TELEGRAPH COMPANY, ETC.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

A True Copy

ATTEST:

Sid J. White
Clerk Supreme Court.

(SEAL)

/s/ Dave Lang, Jr.

DAVE LANG, JR.

Chief Deputy Clerk
Supreme Court of Florida

Y

CC: Hon. Raymond E. Rhodes, Clerk
Hon. Robert L. Howell, Clerk
Hon. Ben C. Willis, Judge

Truett & Watkins
(Hon. J. Ben Watkins)
Isler, Welch, Smith, Higby &
Brown (Hon. Larry G. Smith)

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

DISTRICT COURT OF APPEAL,
FIRST DISTRICT, CASE NO. P-392

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,

Petitioner,

v.

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, JOSEPH A. MALONEY, d/b/a THE APALACHICOLA TIMES, presents this Petition for Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, and says:

1. Petitioner seeks to have reviewed that certain decision of the District Court of Appeal of Florida, First District, dated June 13, 1972, and filed in the records of that court on June 13, 1972, and recorded in Minute Book 6 at Page 134, and Order Denying Petition for Rehearing, dated July 10, 1972, and recorded on the same day in Minute Book 6 at Page 151 of the records of that court.

2. This Petition is presented pursuant to Article V, Section 4, Florida Constitution, and Rule 4.5c(6) of the Florida Appellate Rules. Jurisdiction of this Court is based upon the grounds the decision in this cause is in direct conflict on the same point of law or reaches a different end result on the same or legally comparable set of facts as prior decisions of this Court or another District Court of Appeal of the State of Florida.

3. This Petition is accompanied by conformed copies of so much of the record of the proceeding in the court below, including the decision Petitioner now seeks to have reviewed, as is necessary to show jurisdiction in this Court and is accompanied by a Brief in support of the issue of jurisdiction of this Court to hear this Petition.

4. The following is a brief statement of the facts of this matter:

(a) Petitioner, who was Plaintiff in the Circuit Court of Franklin County and Appellee in the District Court of Appeal of Florida, First District, is the owner, publisher and editor of The Apalachicola Times, a weekly newspaper published in Franklin County, Florida.

(b) B. ROY GIBSON, JR., is and was Vice President and General Manager of the ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, which is the franchised corporation authorized to furnish telephone service in an eight-county area, including Franklin County, Florida. GIBSON and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY were the original Defendants in the Circuit Court and the Appellants in the District Court of Appeal and are the Respondents in this cause.

(c) On April 29, 1965, GIBSON made an address to the Rotary Club in Port St. Joe, Florida, in which he made certain factual allegations which were alleged in the subsequent libel and slander action to have been false and to have been made with actual malice directed against this Petitioner. The address was subsequently printed and distributed by ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY as a mailout with its monthly bills to all its subscribers in eight counties, which act was likewise alleged to have been done with actual malice.

(d) The Complaint in this cause upon which the issues were submitted to the jury alleged *false statements knowingly made by* Defendant GIBSON, individually and in his capacity as the Vice President and General Manager of Defendant ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, and *that such statements were made with actual malice and intent to purposefully cause harm to this Petitioner.*

(e) The Defendants, Respondents here, filed the defenses of qualified privilege and "public figure", and the issues were submitted to the jury upon the allegations of the Complaint as supported by the testimony and evidence and defenses interposed by these Respondents.

(f) The jury was instructed on elements of actual malice which would be required in event Petitioner, Plaintiff below, was found to be a "public figure" and also that a finding of actual malice would be required before punitive damages could be awarded this Plaintiff as claimed in his Complaint.

(g) The jury returned a verdict for both compensatory and punitive damages, assessing $5,000 in compensatory damages against the individual Defendant, GIBSON, and the corporate Defendant, ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, and $20,000 in punitive damages against the corporate Defendant only.

(h) The District Court of Appeal upon these facts reversed the Judgment entered in accordance with the Verdict of the jury upon two grounds:

(1) The trial court erred in leaving to the jury as a finding of fact the question of whether Plaintiff was a "public figure", and

(2) The finding by the jury of actual malice in false statements knowingly and willfully made did not constitute "actionable libel" and therefore the trial court was directed to enter Judgment in favor of these Respondents and against this Petitioner, the original Plaintiff.

(i) This cause was first tried in the Circuit Court of Franklin County and a Final Judgment entered April 28, 1967, in accordance with the Verdict of a jury awarding compensatory and punitive damages to Petitioner.

That Judgment was affirmed by the District Court of Appeal, First District, by opinion filed August 27, 1968, reported as

GIBSON V. MALONEY
(Fla.App. 1, 1968)
214 So.2d 89.

(j) Certiorari was granted by this Court, and the Opinion of the District Court was quashed by the Opinion of this Court filed January 28, 1970, and reported as

GIBSON V. MALONEY
(Fla.App. 1, 1970)
231 So.2d 823.

The Opinion by this Court contained the instructions that "* * * *the cause is remanded to the District Court of Appeal with instructions that this cause be further remanded for a new trial upon proper instructions.*" (Emphasis Supplied)

(k) Petition for Writ of Certiorari was addressed to the United States Supreme Court, and that court by Order entered June 8, 1970, denied the Petition for Writ of Certiorari.

(l) The cause then proceeded to trial in the Circuit Court of Franklin County, and on the third trial, after a mistrial had intervened, the Verdict and Judgment for Plaintiff which were set aside by the District Court of Appeal in their Opinion, review of which is now sought, were entered.

5. The Points Involved on Appeal as stated in the Opinion by the District Court of Appeal were as follows:

POINT ONE

WHETHER THE PRIOR OPINION BY THIS COURT ESTABLISHED AS THE "LAW OF THE CASE" APPLICABLE IN SUBSEQUENT RETRIALS THAT PLAINTIFF-PETITIONER WAS A "PUBLIC FIGURE" AS A MATTER OF LAW AND SUCH ISSUE SHOULD NOT BE SUBMITTED TO THE JURY FOR THEIR FINDING.

POINT TWO

WHETHER THE DETERMINATION BY THIS COURT IN ITS PRIOR OPINION AS REFLECTED IN ITS INSTRUCTIONS THAT THE CAUSE BE REMANDED "• • • FOR A NEW TRIAL UPON PROPER INSTRUCTIONS." BECAME THE LAW OF THE CASE AND SHOULD GOVERN SUBSEQUENT RETRIALS OF THE MATTER.

POINT THREE

WHETHER WHEN THERE ARE CONFLICTING ISSUES OF FACT THE QUESTION OF WHETHER AN INDIVIDUAL IS A "PUBLIC FIGURE" IS A QUESTION OF FACT OR IS TO BE DETERMINED BY THE TRIAL COURT AS A MATTER OF LAW.

POINT FOUR

WHEN THERE IS A FINDING OF ACTUAL MALICE AS REFLECTED BY AN AWARD OF PUNITIVE DAMAGES IS THERE SUFFICIENT PROOF OF ACTUAL MALICE TO WARRANT UPHOLDING THE VERDICT IN A LIBEL AND SLANDER ACTION, THE FACT PLAINTIFF MAY OR MAY NOT BE A "PUBLIC FIGURE" NOTWITHSTANDING?

6. The same point of law was involved in the prior ruling by this Court in this particular case and also conflicts with the decision of this Court in *State of Florida, ex rel Virgil D. Hawkins v. Board of Control*, (Fla. 1955), 83 So.2d 20, which held that in construing the Constitution of the United States state courts are bound to abide by the decisions and interpretations of that Constitution by the United States Supreme Court.

The finding by the jury in this cause that actual malice existed with the making of the false statements alleged in the Complaint, as reflected by the award of punitive damages under the instruction by the trial court, should be allowed to stand under the decisions of the United States Supreme Court in *New York Times v. Sullivan*, (1964), 84 S.Ct. 710, et seq.; *Associated Press v. Walker*, (1967), and *Curtis Publishing Company v. Butts*, (1967), both reported in 87 S.Ct. 1975, et seq.; and *Rosenbloom v. Metromedia*, (1971), 29 L.Ed.2d 318; and the decision by the Third Circuit Court of Appeals in the case of *C. R. Grove, et al. v. Dun & Bradstreet, Inc.*, (CCA 3, 1970), 438 F.2d 433, certiorari denied United States Supreme Court June, 1971, 92 S.Ct. 204; and the Circuit Court of Appeals

of the Tenth Circuit in *Kansas Electric Supply Company v. Dun & Bradstreet, Inc.*, (CCA 10, 1971), 448 F.2d 647, certiorari denied United States Supreme Court March, 1972, 92 S.Ct. 1289, which held that the *"public figure" privilege and the "New York Times Doctrine" did not apply to private subscription credit reports or other private individuals or publications which did not disseminate news for consideration by the general public*, which would be the applicable situation involving the publication which was alleged to be libelous in this instance.

The District Court's opinion likewise conflicts with this Court's opinion in *Abram v. Odham*, (Fla. 1956), 89 So.2d 334, which held the issue of "actual malice" was for determination by a jury and the trial court erred in dismissing the Complaint as a matter of law in that case.

7. The District Court of Appeal, First District, in its Opinion, review of which is now sought, is in conflict with the prior decision of this Court in the instant case and with the other decisions of this Court which hold that in interpreting the United States Constitution the state courts shall follow prior interpretations by the United States Supreme Court and likewise decisions of this Court which hold that actual malice is a prerequisite to the award of punitive damages and upon such instructions the jury in this instance awarded punitive damages, which was a jury question as shown in the ABRAM case, supra.

8. The decision of the District Court of Appeal, First District, which Petitioner seeks to have reviewed being in direct conflict with the above-mentioned decisions of this Court and other District Courts of Appeal of Florida and because of the reasons and authorities set forth in Peti-

tioner's Brief, it is believed this Court has jurisdiction in this cause and the Petition should be granted and Writ of Certiorari issued so this Court may review on the merits the decision of the District Court of Appeal, First District, in this cause.

WHEREFORE, Petitioner requests this Court issue its Writ of Certiorari and to review this matter on the merits and then to quash the decision and Order hereby sought to be reviewed and grant such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

J. Ben Watkins

TRUETT & WATKINS
The Title Building
Tallahassee, Florida
Attorneys for Petitioner

I hereby certify copy of the foregoing Petition for Writ of Certiorari was furnished District Court of Appeal, First District, Supreme Court Building, Tallahassee, Florida, and to Larry G. Smith, Esq., Isler, Welch, Bryant, Smith, Higby & Brown, 434 Magnolia Avenue, Panama City, Florida, by mail this 8th day of August, 1972.

J. Ben Watkins

J. BEN WATKINS

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972.

CASE NO. P-392

B. ROY GIBSON, JR., and
ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY,
a corporation under the laws of the State of Florida,
Appellants,

v.

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Appellee.

NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARING
PETITION AND DISPOSITION
THEREOF IF FILED.

Opinion Filed June 13, 1972.

An Appeal from the Circuit Court for Franklin County. Ben C. Willis, Judge.

Larry G. Smith of Isler, Welch, Bryant, Smith, Higby & Brown, for Appellants.

Truett & Watkins, for Appellee.

SPECTOR, Chief Judge.

Appellee's libel action against appellants has been considered by this court on an earlier occasion. Gibson v. Maloney, 214 So.2d 89.

In that case, we affirmed a libel judgment against appellants in the amount of $10,000 compensatory damages and $5,000 punitive damages. The Florida Supreme Court granted certiorari and reversed this court, holding that appellee made himself a "public figure" by virtue of his newspaper publishing activities; and, therefore, under the holdings in Abram v. Odham, 89 So.2d 334; Jacova v. Southern Radio and Television Company, 83 So.2d 34; and New York Times v. Sullivan, 376 U.S. 254, the statement that gave rise to this suit was fair comment on a public matter relating to an individual who had by choice made himself newsworthy and a part of the passing scene. See Gibson v. Maloney, 231 So.2d 823. So holding, the Supreme Court directed us to remand the cause for a new trial upon proper instruction.

Upon remand a second trial was held in January of 1971 which resulted in a mistrial when the jury was unable to agree on a verdict. In May 1971, a third trial was held which resulted in the judgment against both appellants for $5,000 compensatory damages and $20,000 punitive damages against the corporate appellant only.

The facts underlying this controversy are fully set forth in the two prior appellate decisions cited above, necessitating only a brief recitation of them in the opinion where required. Appellant Gibson is an officer of the corporate appellant. In 1965, while addressing the Port St. Joe Rotary Club, he made the following statement:

"Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; and, in my opinion, frequently, in referring to the Alfred I. DuPont Estate and its various interests, not only vents his displeasure, venom, and, in some instances, outright falsehoods— this in spite of the fact that the interests of the Alfred I. DuPont Estate are one of the largest taxpayers in the County.

* * *

"In closing, I shall simply say that I think we in Port St. Joe, and in all of the communities where the St. Joseph Telephone & Telegraph Company furnished telephone services — with the exception of Apalachiocola — are fortunate in having newspapers, in their communities, or near them, that welcome and invite business and industry. Business and industry do not go where they are unwanted and vilified, but where they are wanted and invited."

Thereafter, Gibson had the speech printed and mailed to some 6,000 telephone subscribers of the company and appellee brought this action, alleging that he was libeled by the appellants' conduct. The trials, judgments and appellate proceedings described above ensued.

The first point raised by appellant for reversal is that the trial court erred in refusing to charge the jury that the plaintiff was, as a matter of law, a public figure and that therefore plaintiff was entitled to recover only upon proof that Gibson made the defamatory statement complained of with actual malice.

The trial court gave the following instruction to the jury on the "public figure" issue:

> "There are some different rules which are applicable when the person who seeks to recover for defamation is what is known as a public figure. The public figure is not necessarily a public official, but may be anyone whose occupation or activities cause him to stand out from the general public, or one who engages in a public enterprise or course of conduct whereby he seeks to influence public opinion. Now, a public figure may not recover damages for defamatory falsehood relating to his conduct in connection with the activities which have made him a public figure, unless he proves that the statement or statements were made with actual malice; that is, with the knowledge that it was false or made with a reckless disregard of whether it was false or not. If you should find from the greater weight of the evidence that Mr. Maloney was, at the time of the events which have been involved here, a public figure, as I have defined it, he may recover only if you find that any defamatory statement made, was made by the defendants with actual malice against the plaintiff."

The thrust of appellants' objection to the above instruction is that it left the question of whether the plaintiff was a public figure for the jury to decide when the Supreme Court had decided, as a matter of law, that the plaintiff was a "public figure" in its opinion in the certiorari proceedings at 231 So.2d 824. The Supreme Court made the following statements regarding the status of the plaintiff:

> "The record clearly shows that appellees acquired a small weekly newspaper in Apalachicola, Florida, and immediately started a news and editorial campaign against the Alfred I. duPont interests and its affiliates, St. Joe Paper Company and St. Joseph Telephone and Telegraph Company. Samples of the publications in the record demonstate an attempt to harass and abuse the duPont interests, apparently for the purpose of convincing the public that these interests were some sort of evil influence in the community of Apalachicola and that it would therefore not be a good place to live and do business.
>
> * * *
>
> "There can be little doubt that Maloney entered the area and established the anti-duPont editorial policy of his Apalachicola Times, for the purpose of arousing public indignation against these interests, and by virtue of that made himself a public figure engaged in a public enterprise and for the purpose, among other things, of influencing public opinion. He became a part of the passing scene and therefore subject to fair comment. . . ."

Appellants contend that the Supreme Court's ruling on the "public figure" question became the law of the case, and therefore it was error to permit that question to be decided by the jury on retrial. We agree. Under the instruction as given, the jury was not required to find that plaintiff was a public figure. Indeed, as worded, the instruction enabled the jury to find that plaintiff was not a public figure, a finding which if made would run counter to the holding of the Supreme Court.

Insofar as the public figure question is concerned, the same facts were adduced on retrial as were before the Supreme Court when it made the decision that plaintiff was a "public figure". Thus, the jury was erroneously empowered to supersede the Supreme Court's ruling with respect to that issue. At this juncture, it is necessary to recognize that class of persons coming within the "public official" doctrine of the New York Times v. Sullivan case, supra, has been broadened not only to include "public figures" in subsequent cases but has more recently been even further broadened so as to include a private individual about whom a defamatory falsehood has been uttered in a newscast about the individual's involvement in an event of public or general interest. See Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296.

In light of the expanded class of persons which the United States Supreme Court has permitted to be inadvertently defamed in the absence of actual malice in the interest of the dominant policy of fostering an unfettered exchange of opinion concerning public officials, public figures and individual involvement in events of public interest, there can be no doubt that the plaintiff in the case at bar falls within the ambit of the Sullivan rule as expanded by its progeny.

Having concluded, as we do, that the plaintiff is a public figure and that the jury should have been so instructed, the criticality of the trial court's failure to do so becomes apparent. Since the instruction as worded required the jury to find actual malice as a prerequisite to liability only if it found that plaintiff was a public figure, the jury could have found that plaintiff was not a public figure and therefore could have found for plaintiff without finding that actual malice existed. When viewed in this perspective, the prejudice to appellants which resulted from the failure to give the defendant's requested instruction on the "public figure" issue is inescapable. For this reason alone, the judgment reviewed herein must be reversed.

Further examination of the instruction as given to the jury indicates that the jury was not properly instructed as to the appropriate quantum of proof which is necessary to sustain a libel judgment in a public figure case. We hasten to add that the entire field of libel actions has recently undergone a significant change as to governing principles. Some of these changes have taken place subsequent to the trial in the case at bar. Accordingly, although we must apply new principles which have evolved during this appeal, we think it only fair to observe that in large measure the judgment now under review must be reversed by reason of changes in the law of libel occurring after the entry of the final judgment and, of course, of which the trial court was unaware.

Reviewing the instruction as given to the jury, we note the following language: "If you should find from the greater weight of the evidence that . . .". Such instruction as to the quantum of proof required is consistent with that normally utilized in a civil case. In Rosenbloom v. Metromedia at 29 L.Ed.2d 318, the court described the quantum of proof necessary to be as follows:

> " . . . none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not."

In St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262, the court likewise held that actual malice in a libel case must be proved with "convincing clarity". In Bon Air v. Time, 426 F.2d 858, 864, (C.A. 5th, 1970), the court stated the proper burden of proof in the following terms:

> "In addition the Court placed a heavy burden of proof on plaintiffs — actual malice must be proved with 'convincing clarity'."

Clear and convincing evidence exceeds the usual standard or quantum of proof customarily invoked in civil cases usually described as a preponderance of evidence or, as did the trial court below in its instruction to the jury, by the greater weight of the evidence. Yet, it does not approach that degree of certainty understood to be inherent in the "beyond a reasonable doubt" standard used in criminal cases. See The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

In instructing the jury that the plaintiff herein had the burden of proving his case by the lesser standard of proof, that is, by the greater weight of the evidence, the court permitted the jury to render a verdict on an impermissible constitutional standard of proof. A further point raised by appellants contends that the sufficiency of the evidence to support a jury verdict based on actual malice in a libel action was lacking. In determining the sufficiency

of the evidence, our "duty is not limited to the elaboration of constitutional principles; we must also, in proper cases, review the evidence to make certain that those principles have been constitutionally applied". New York Times v. Sullivan, 376 U.S. 254 at 285. Commenting on the necessity of reviewing the evidence, the court in Rosenbloom v. Metromedia, supra, stated at 29 L.Ed.2d 318:

> " 'With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' (footnote omitted)
>
> "Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' Jacobellis v. Ohio, 378 U.S. 84, 190, 12 L.Ed.2d 793, 799, 84 S.Ct. 1676 (1964). The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review."

Actual malice in a libel action is more than a mere negligent error. The plaintiff must prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. New York Times v. Sullivan, 376 U.S. at 286-288, 292; and Garrison v. Louisiana, 379 U.S. 64, 73-75, 79. Garrison emphasizes that even ill will or

intent to harm are not enough. There must be showing of an intent to harm "through falsehood". (379 U.S. at 78)

An examination of the allegedly defamatory statement made by appellant Gibson at the speech before the Rotary Club in Port St. Joe can only be made in light of the publications made by appellee via his newspaper publishing facilities. Appellee's publications which were admitted in evidence amount merely to an opinion by him that the business interests by whom appellant Gibson is employed are responsible for the area's economic ills. Appellee is entitled to that opinion under the freedom of speech protected by the First Amendment. On the other hand, the statements made by appellant Gibson likewise amount to no more than his opinion that appellee's attitude toward business interests are responsible for the area's economic ills. He is entitled to hold his opinion just as much as the appellee is. Gibson's statement that appellee is anti-business is not totally without proof in this record. Indeed, at least insofar as Gibson's employer and its affiliated interests are concerned, that fact appears with convincing clarity in appellee's editorials. That appellee published inaccurate statements about the duPont interests is likewise inescapable from this record. Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made. But, its inaccuracy, etc., lies not in the representation that there was a reduction of 74 telephones in the Apalachicola exchange, because factually there was. Rather, the misrepresentation lay in

what Gibson did not say, that is, that the 74 telephones were lost to Apalachicola because they were transferred to East Point. Boiled down to its essence then, if appellee was in any way libeled by appellant's references to the number of telephones lost, that libel rests upon what Gibson did not say rather than what he did say.

We cannot find, based on our independent analysis of the record, that the proofs considered either singularly or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statements about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not. A finding of actual malice in a libel case coming within the purview of New York Times v. Sullivan and its progeny cannot rest on whether a reasonably prudent man would have published or would have investigated before publishing the statement complained of. St. Amant v. Thompson, 390 U.S. at 731. The continually evolving constitutional standards which measure one's right to comment upon matters of public interest and concern simply do not permit us to hold that what transpired during the continuing exchange of opinions of each other by the parties herein amounts to actionable libel.

Accordingly, the judgments appealed herein are reversed and the cause is demanded with directions to enter judgment in favor of the appellants.

JOHNSON, J., CONCURS. WIGGINTON, J., CONCURS IN PART, DISSENTS IN PART.

WIGGINTON, J., concurring in part, dissenting in part.

I concur in that part of the able opinion authored by Judge Spector which holds that the trial court erred in

submitting to the jury the issue of whether appellee was a public figure, thereby leaving to the jury's determination whether proof of actual malice was required of appellee in order to sustain his cause of action. Because of this error, I agree that the judgment should be set aside in order that a new trial under proper instructions to the jury may be had.

I cannot agree with the concluding portion of the majority opinion which holds as a matter of law that no jury question as to whether the alleged libelous statement made by appellant was made with actual malice. The speech made by appellant Gibson unequivocally charged appellee with having printed and published outright falsehoods against the Alfred I. DuPont Estate and its various interests including appellant, St. Joseph Telephone & Telegraph Company, for the purpose of venting his venom and displeasure and berating and abusing them. A statement charging any person with having published lies against another for the purpose of berating and abusing them is libelous per se from which actual malice may be implied. The act of appellant Gibson in having his speech printed and mailed to 6,000 of his telephone subscribers in the coverage area of appellee's newspaper is sufficient proof of actual malice to sustain the jury's verdict. The question of malice thus becomes one to be resolved by the jury in light of the explanation made by appellant as to his motives and intentions in making the statement and his proof of truthfulness. The proof does not establish as a matter of law that appellant's charge against appellee was true, thereby absolving appellant from liability. I therefore cannot agree that the trial court should be directed to enter judgment in favor of appellants.

APPENDIX D

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1972

CASE NO. P-392

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH CO., a corporation under the laws of the State of Florida,

Appellants,

-vs-

JOSEPH A. MALONEY, d/b/a THE APALACHICOLA TIMES

Appellee,

ORDER

Petition for Rehearing having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 10th day of July, A. D. 1972.

Raymond E. Rhodes

Clerk

A True Copy
ATTEST

Raymond E. Rhodes
Clerk, First District Court of Appeal
Tallahassee, Florida

FILE COPY

Supreme Court, U. S.
FILED
FEB 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1065

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles S. Isler, Jr. of
ISLER, WELCH, HIGBY & BROWN
434 Magnolia Avenue
Panama City, Florida 32401

ATTORNEYS FOR RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1065

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company, file this Brief in opposition to Petition of Joseph A. Maloney, d/b/a The Apalachicola Times, seeking Writ of Certiorari to the Supreme Court of Florida and the District Court of Appeal of Florida, First District, to review the opinion of the District Court of Appeal entered in this cause on June 13, 1972.

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §1257 (3) and Rule 19(1)(a), Supreme Court Rules. Respond-

ents submit that the decision of the District Court of Appeal of Florida clearly does not decide a federal question of substance in a way not in accord with applicable decisions of this Court, therefore this Court should decline jurisdiction at the outset.

QUESTIONS PRESENTED

Respondents do not agree that the questions presented in the Petition are properly before this Court. Respondents further submit that the two questions presented by Petitioner should be answered as follows:

ONE:

The opinion of the District Court of Appeal of Florida does not decide a substantial federal question in a way not in accord with prior decisions of this Court.

TWO:

The opinion of the District Court of Appeal of Florida does not misinterpret and misapply the decisions of this Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), so as to deny Petitioner's right to jury trial.

REASONS FOR DENYING THE WRIT

The District Court of Appeal of Florida correctly interpreted and applied the opinions of this Court, partic-

ularly *New York Times v. Sullivan*, supra, and *Rosenbloom v. Metromedia, Inc.*, supra, in holding that Respondent's actions were constitutionally privileged under the First Amendment right of free speech.

In *Curtis Publishing Co. v. Butts, Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975 (1967), this Court expanded the class of persons coming within the "public official" doctrine of *New York Times v. Sullivan* to include a "public figure" who has been "involved in issues in which the public has a justified and important interest". *Id.* at 134, 87 S.Ct. at 1980. *Rosenbloom v. Metromedia, Inc.* further expanded this class to include a private individual whose involvement in an event of public or general interest has been the subject of defamation. Under this line of decisions, false publications are privileged, absent proof of "actual malice", in the interest of the dominant principle that "debate on *public issues* should be uninhibited, robust, and wide-open." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 43, 91 S.Ct. at 1819. This Court has clearly defined "actual malice" as existing only when a statement is made with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-280, 84 S.Ct. at 726.

On examination of the record of the first trial, the Supreme Court of Florida held that Petitioner was indeed a "public figure" by virtue of his own editorial actions which made him "a part of the passing scene and therefore subject to fair comment." *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla. 1970). The Court further

expressly found that the issue of community economic growth with which Petitioner had become identified by his own editorial actions was a proper subject for public interest. *Id.* at 826. As result of these findings, Petitioner himself clearly falls not only within the scope of the "public figure" privilege enunciated by *Butts*, but Petitioner's actions fall within the "public events" expansion of *Rosenbloom*.

Following the law of the case enunciated by the Supreme Court of Florida that Petitioner was indeed a public figure involved in events of public interest, the District Court of Appeal examined the record of retrial and found that the jury had not been limited to finding Respondents liable only if malice were deemed proved. The District Court of Appeal made an independent examination of the trial record for evidence of malice which might support the jury's verdict in favor of Petitioner but concluded:

> "We cannot find, based on our independent analysis of the record, that the proofs considered either singularly or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statement about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not." *Gibson v. Maloney*, 263 So.2d 632, 637 (1st D.C.A. Fla. 1972).

In considering the requisite element of malice, the District Court of Appeal continued to act in accordance with the decisions of this Court when it examined the sufficiency of the evidence before the jury. This Court imposes this duty of de novo review.

> "Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into fact-finding in this area simply because it is time consuming or difficult. We stated in Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946), that:
>
> 'The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which requires interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they *** are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'
>
> Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' Jacobellis v. Ohio, 378

> U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2nd 793 (1964). The simple fact is that First Amendment questions of 'constitution fact' compel this Court's de novo review." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 53-54, 91 S.Ct. at 1824-1825.

The District Court of Appeal was therefore required to reverse the jury verdict when its examination disclosed insufficient evidence to support the finding of malice essential to any liability of Respondents. To have done otherwise would have grossly denied Respondents the protection of the First Amendment.

Petitioner has sought in the Petition to remove the instant case from the scope of privilege by reliance upon examples of defamation within a private group or "trade libel". In the case emphasized by Petitioner, the federal court of appeals found the dissemination of *specialized* financial information to subscribers was not within the area of public interest which is the underlying justification for the privilege. *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. den. ____ U.S. ____, 92 S.Ct. 1289 (1972). The instant case concerns defamations which clearly fall within the scope of general public interest and were thus so expressly found by the Florida Supreme Court. *Gibson v. Maloney*, 231 So.2d 823, 826 (Fla. 1970). Nor was the audience in the present case a closed group whose distinguishing feature is a private business interest as in the case cited by Petitioner. In fact, the Florida Supreme Court took judicial notice of the public nature of Rotary Clubs. *Id.* Fur-

thermore, printed copies of Respondents' speech were mailed to the general subscribers of Respondents' telephone service in an effort to achieve greater publication.

The proceedings of the Florida courts conclusively reveal that those courts clearly considered the policies underlying the decisions of this Court in *New York Times v. Sullivan* and its progeny and meticulously applied those decisions to the present case.

Petitioner's claim under the Seventh Amendment's guarantee of jury trial has no basis in law and therefore is not properly before this Court. The Seventh Amendment's provision for jury trial has not been incorporated by the Fourteenth Amendment.

> "A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." *Olesen v. Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir. 1957), cert. den. 355 U.S. 896, 78 S.Ct. 70 (1957).

CONCLUSION

The Court should decline to issue the Writ of Certiorari in this case on jurisdictional grounds. Prior decisions of this Court have been correctly interpreted and applied in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES S. ISLER, JR., a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner by mailing copy thereof in duly addressed envelope to J. Ben Watkins of Watkins & Hill, P. O. Drawer 1814, Tallahassee, Florida 32302, Attorneys for Petitioner, this ____ day of February, 1973.

Charles S. Isler, Jr.